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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

FEDERAL POWER COMMISSION, ET AL. ..... *Petitioners*

v. No. 543

ARKANSAS POWER & LIGHT COMPANY ..... *Respondent*

BRIEF FOR THE STATES AS *AMICI CURIAE*

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STATEMENT

Believing that the question here involved and which must necessarily be decided affects not only the State of Arkansas, but all of the States of this nation, this brief is submitted by several of the States pursuant to permission granted by Rule 27 (9) of the Rules of this Court, for the purpose of pointing out and emphasizing the interest of the State of Arkansas and other States in this litigation and the position to which they will be relegated, if the contention of the petitioners (hereinafter referred to as Federal Commission) were sustained.

While the State of Arkansas is itself not a party to this litigation, one of its agencies is, the Arkansas Public Service Commission (hereinafter referred to as the State Commission).

The only question decided by the court below, and therefore, the only question which may be considered here, was that of jurisdiction of the District Court to entertain a suit involving a three-way controversy growing out of conflicting claims of the Federal Commission and of the Arkansas Commission, whereby each authority claims and asserts exclusive regulatory power over what the court below calls the official corporate accounts (R.50) of the Respondent, a public utility incorporated under the laws of Arkansas, and therein engaged in the business of generating, distributing and selling electric energy to consumers and at wholesale to others for resale.

The Respondent is subject to the jurisdiction of the Federal Commission and of the State Commission to the extent respectively provided by Part II of the Federal Power Act (49 Stat. 847, 16 U. S. C. A. 824) and by Act 324 of the Acts of the General Assembly of Arkansas, approved April 2, 1935, which conferred comprehensive jurisdiction on the State Commission.

The Federal Commission's claim of exclusive jurisdiction is based upon Section 301(a) of the Federal Power Act (16 U. S. C. A. Sec. 825). This section gives the Federal Power Commission jurisdiction over certain accounting records of a public utility. It, however, contains a *proviso clause* which withholds from the Federal Commission regulatory power and jurisdiction over any accounting records of a public utility which are required to

be kept by and under authority of the laws of any State. Therefore, the Arkansas Commission's claim of exclusive jurisdiction is based upon the proviso clause of said Section 301(a) and the statutes of the State of Arkansas above referred to.

The principal, if not the sole, contention of the Federal Commission is that the State authority, although asserting, as to an Arkansas corporation, sovereign power expressly delegated to the State Commission by the State of Arkansas, must submit its claim of exclusive jurisdiction over said corporation's accounts to the Federal Commission, and let that agency itself decide the validity of the State's claim.

It is readily apparent that if the contention of the Federal Commission is sustained, the several States, in every instance, where there is a jurisdictional conflict between one of their agencies and a Federal Agency, would be required to submit the validity of their claim of power and authority to the Federal Agency, which disputes the very existence of such power and authority, and that the States and their agencies cannot assert, or even defend claims to sovereign power in the courts, unless and until a mere Administrative Agency has decided the question.

We will not detail the facts and circumstances out of which this litigation arose. To do so would be a repetition of a portion of the brief of the litigants and needlessly increase the labors of the Court.

BRIEF

Interest of the State of Arkansas in This Litigation

Because of the conflicting claims of the two Commissions, the Respondent apparently did not know which to follow. If it followed either, it would obviously run the risk of subjecting itself to the statutory penalties prescribed for not having followed the other and recognized that it must comply with the orders of one or the other, but could not comply with orders of both. Respondent has asserted that it was, and is, willing to keep separate accounts for the benefit and information of the Federal Commission. However, this arrangement was not acceptable, because each Commission asserts the right to require Respondent to keep its official corporate accounts in the manner prescribed by it.

Respondent's position was in 'No Man's Land', so to speak, between the cross fire of the two Commissions. It, therefore, brought this suit for the purpose of securing a judicial declaration as to which Commission it had to obey, and at the same time to provide an appropriate forum in which the two Commissions might contest and settle their conflicting claims. It, therefore, is apparent that this litigation, on its merits, involves a controversy between the two Commissions with respect to which has the exclusive right to supervise and regulate the keeping of Respondent's official corporate accounts, which right both Commissions claim, but which only one may exert. It thus appears that this controversy involves a clash of asserted sovereign rights and power.

The solution of these conflicting claims involves *only* the construction and harmonizing of the statutes of two sovereignties—the Federal Government and the State of Arkansas. Therefore, the State of Arkansas has a direct and vital interest in any decision which may be rendered in this litigation on its merits.

Furthermore, the State is intensely interested in the jurisdictional question now before the Court. The Federal Commission contended in the court below, in its brief upon *certiorari*, and no doubt will again contend, that the District Court has no jurisdiction to entertain this suit and to determine the legal effect of the Arkansas regulatory statute when considered in connection with the related Federal Power Act. In support of this contention the Federal Commission, in effect, argues that the State, through the State Commission, must intervene in the proceedings pending before the Federal Commission involving the accounts of the Respondent and there assert its claim and exhaust its so-called administrative remedy; and if the State is dissatisfied with the decision of that Commission, it must seek a review before an appropriate Circuit Court of Appeals.

Such procedure, aside from being novel, has never been enforced against a State or an agency thereof asserting or defending sovereign rights and powers against encroachment by a bureau of the Federal Government. The argument belittles the dignity and sovereignty, not only of Arkansas, but of every State of this Nation. It lowers a State to the same plane as the private corporation. It weakens the ties which have held the Federal system together, and, if upheld, it would strip the States of a

right which tradition has made sacred—the right to defend in the National Courts and there to assert their claim of sovereign power and authority.

The District Court Has Jurisdiction

In support of its contention, the Federal Commission does not point out or refer to any language of the Federal Power Act or any other Act of Congress making mandatory the procedure indicated, or which even tends to deprive the District Court of any jurisdiction conferred by the general and broad grant of jurisdiction made by Section 24 of the Judicial Code (28 U. S. C. A. Sec. 41).

In passing, it is respectfully insisted that if the Congress, by the enactment of the Federal Power Act, had intended to require a State to assert or defend before the Federal Commission a claim of sovereign rights and power to regulate and supervise the official accounting records of one of its own corporations, and to close the doors of the Federal Courts to the State until after that Commission had first passed on the question, it could, and would, have used language expressly so providing. Not having done so, with due deference, it is insisted that the Court should not impute such intention to Congress or read into the Act any such requirement.

Apparently, the Federal Commission, for support of its contention, principally relies upon a rule of expediency adopted by the courts, not because of their lack of jurisdiction to hear and determine the issues, but out of deference to the expeditious hearing and conclusion of administrative proceedings. This rule requires that, in appropriate cases, a party must exhaust its administrative remedy before resorting to the courts. In support of its

application of the rule here, the Federal Commission cites several cases from this Court. Those principally relied upon are *Myers* v. *Bethlehem Shipbuilding Company,* 303 U. S. 41 (1938), and *Macauley* v. *Waterman Steamship Corporation* No. 435, October Term 1945, decided March 25, 1946. It is respectfully submitted that the opinions in those cases are clearly distinguishable from and have no application to the circumstances in the case at bar, and are, therefore, neither controlling or persuasive.

It is true that in both of those cases the Court held that a party could not resort to the District Court for a declaration that an Administrative Act did not comprehend particular activities of a party. In those cases, however, the jurisdiction of the administrative agency and the coverage of the Administrative Act could not be determined from the statutes alone, but could only be ascertained from facts as to the nature and character of the activities and operations of the parties and the contracts executed by them. In those cases no State or State Agency was disputing the right of a Federal Agency to regulate the particular businesses involved; and no State or State Agency was present there insisting and claiming that it had, under the express language of the Act of Congress and the statutes of the State, the exclusive power and authority to regulate the objects or activities which the Federal Agencies were undertaking to regulate. In those cases the construction and effect of State statutes were not involved, while here any tribunal undertaking to solve the conflicting claims of the two Commissions is confronted with the necessity of determining what the state law requires.

The distinction between those cases and the one here cannot be more cogently stated and their inapplication here more clearly expressed than to quote the language of Mr. Justice Miller, speaking for the court below with respect to the *Macauley* case. He said: "This argument overlooks the fundamental fact that something more is at stake here than merely to gauge the sweep of the federal statute. For it is one thing for a federal administrative agency to rule as to the coverage of its own act when that act stands alone. It is quite another for the agency to decide whether its organic act overrides the statute of a different sovereignty which already has been applied by the state authorities to the situation which the agency desires to control by applying the federal act. That is a task for the courts. We do not understand the *Macauley* case as extending to a federal agency the unprecedented power of exercising such a clearly judicial function" (Note 17; R.62).

Rule of Expediency Should Not Be Applied

However, even if it be assumed that the principles of the *Myer* and *Macauley* cases should be applied in cases which require no factual determinations, there are other cogent reasons why the rule of expediency, requiring resort to and exhaustion of the administrative remedy, should not be applied in the case at bar.

As heretofore pointed out the rule requiring the exhaustion of administrative remedies before resorting to the courts for relief is a rule of expediency adopted by the courts for the purpose of expediting administrative procedure. It in no wise affects the jurisdiction of the courts. It merely brings into play a judicial discretion

through the exercise of which a court may either retain or decline jurisdiction of a cause. *City of El Paso* v. *Texas Cities Gas Co.*, 100 F. (2d) 501, 503; *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274. The exercise of judicial discretion presupposes jurisdiction of the cause. *Maryland Casualty* v. *United Corporation*, 111 F. (2d) 443-445 (1st Cir., 1940); *Murray* v. *City of Pocatello*, 226 U. S. 318.

A rather close search has failed to disclose a single instance where the Federal Courts, through the exercise of judicial discretion, have closed their doors to a State and required it to assert or defend its powers of sovereignty, involving purely a judicial question, before a federal administrative agency. This fact is probably due to the idea which has prevailed throughout the history of this nation that States, as independent sovereigns, should be accorded a dignity not usually and ordinarily accorded ordinary litigants.

The framers of the Constitution and the authors of the Judiciary Act of 1789 (frequently treated as contemporary with the Constitution) clearly recognized that the States, as independent sovereigns, should not be treated as ordinary litigants whether asserting or defending claims to rights and powers and especially was this true in instances involving their power as sovereigns.

The Judiciary Act (1 Stat. at L. 80) provided that "the Supreme Court should have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and the citizens of other States or aliens, in which latter cases it shall have original, but not exclusive jurisdiction".

The earliest recognition by this Court that a State because of its sovereignty should be accorded the dignity not ascribed to ordinary litigants is found in the language of Mr. Justice Blair in the early case of *Chisholm* v. *Georgia*, 2 Dall. 419, 451, 1 L. Ed. 440-454 (1792). The Justice, in discussing the arrangement of the language of the Judiciary Act, said: " • • • probably the State was first named in respect to the dignity of a State".

In speaking for the Court and of the jurisdiction of the court to hear and determine cases wherein States were parties, Mr. Justice Harlan, in *U. S.* v. *Texas*, 143 U. S. 621, 643, said, "Such exclusive jurisdiction was given to this Court *because it best comports with the dignity of a State* that a case in which it was a party should be determined by the highest rather than by a subordinate judicial tribunal of the nation" (Emphasis supplied).

Thus it is seen that throughout the history of this nation, the States have been accorded the dignity incident to sovereignty. Their claims of power and authority of sovereignty were especially dealt with by the framers of our judicial system and they were accorded privileges with respect to their litigation generally, which were not accorded ordinary citizens or business enterprises. They were given the right to assert or defend their sovereign powers before *judicial tribunals*, and it was not contemplated that they would have to place themselves on the level with citizens and business enterprises and assert or defend a sovereign right before a mere administrative agency. *A fortiori*, it was not contemplated that they should submit such claims to the consideration of an agency which by its acts and conduct denies the existence in the States of the very powers and rights claimed.

If the courts should decline jurisdiction of this cause and thereby commit the settlement of the conflict to the Federal Commission, the State and one of its agencies, would be deprived of a hearing before an unbiased and impartial tribunal. The Federal Commission has determined how it will settle the conflict. It has no respect for the State's claim. It is not impartial, and cannot be, or it would not have issued its order requiring the Respondent to show cause why it should not be required to make entries in its corporate accounting records nullifying those made therein at the instance of the State Commission. As observed by the court below, "It would be unrealistic to entertain any doubt as to whether the Federal Commission not only claimed, but fully intended to exercise, sole and exclusive jurisdiction over the official accounting records in a manner in conflict with the orders already made by the State Commission" (R.60).

Throughout the history of this nation the courts have recognized and zealously enforced the provisions of the Federal Constitution and the Federal Judiciary Act providing for the trial of causes and the adjudication of rights before impartial tribunals.

In complete disregard of the principle requiring impartiality, the Federal Commission insists that the courts here, where the sovereign rights of a State are involved, depart from their long-established rule, and commit the solution of a serious judicial question involving the rights and powers of a State to a federal administrative agency. While such action may not violate any Constitutional rights of the State, it would violate the *esprit* of the Federal system as originally conceived, and would unnecessarily humble and humiliate the State, which, it is respect-

fully insisted the Court is not warranted in doing, if there is any way to avoid such result. There is a way. Require the District Court to determine and settle the conflicting claims.

Is it possible that the States of this Nation have sunk so low in the governmental scheme that they are no longer entitled, in the first instance, to contest their sovereign rights before the courts, even though the determination sought is strictly judicial? Are their rights, powers and prerogatives, as independent sovereigns, now so lightly regarded that the Federal Courts may not consider or define them until *after* a biased administrative agency has first considered and first construed and first applied the statutes of the State and determined their relation to a particular Federal Statute?

We insist that any such result is an affront to sovereignty. Such result will, if put into effect, strip the States of the dignity accorded them by the builders of this Nation who set up our great judiciary system which the decisions of this Court have both shaped and recognized.

While we realize that the bureaus and administrative agences of this Nation now exercise many powers and prerogatives formerly possessed and exercised by the States, and seek to deprive the States of the dignity, power and authority accorded them by the founding fathers, we believe this is the first instance in the judicial history of this Nation where a Federal administrative agency, in its grasp for power and authority, has ever asserted or insisted that the States are no longer entitled to assert and defend their sovereign power in the courts of this Nation, without first submitting the question to a mere administrative tribunal.

In conclusion, and with due deference, we insist that the States of this Nation should not, through the application of a mere rule of expediency—a court-made rule—be stripped of their right to resort to the courts in the defense of their sovereign powers, and that they should not further be humiliated by being required to submit to and defend before a mere administrative agency, wholly devoid of genuine judicial power, any of their rights of sovereignty, or be required to plead before such an agency for the privilege of exercising those rights.

Dated:
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Respectfully submitted

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